Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review— Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF
INNER CITY BROADCASTING CORPORATION

Inner City Broadcasting Corporation ("Inner City"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding. Inner City's earlier Comments urged the Commission to adopt the Arbitron metro as the economically rational definition of radio markets in order to promote the public interest and to fulfill the statutory mandate of Section 202 of the Telecommunications Act of 1996. As shown below, based upon the record before the Commission, the Commission should adopt the Arbitron metro definition promptly.

In its Comments, Inner City strongly endorsed and supported the Comments and Reply Comments submitted by the National Association of Black Owned Broadcasters ("NABOB").[1] Inner City and NABOB demonstrated that the Commission should eliminate its current radio

[1] *See* Comments and Reply Comments of NABOB in MM Docket No. 01-317 and 00-244.

market definition, which examines predicted station coverage areas, and replace it with Arbitron metro market.

Inner City established that, while the Telecommunications Act of 1996 provides the local ownership limits for radio stations,[2] it leaves to the Commission, as part of its public interest obligations, the exact definition of "market."[3] The definition currently in place relies upon predicted coverage of radio signals and not upon any condition directly related to radio competition in the actual marketplace. That definition has thwarted the public interest in diverse viewpoints and ownership and circumvented the statutory local ownership limits for radio. NABOB clearly demonstrated that the current signal-based definition actually has violated Congressional intent because many cities face common ownership of nine to twelve radio stations when Congress directed that eight should be the outer limit.[4] (NABOB Reply, pp. 3-4)

In its January 2, 2003 Comments, NABOB demonstrated that in eleven radio markets, there are groups of radio stations of nine to twelve which are commonly controlled, even though Congress mandated that no local radio group be larger than eight stations, and then only in the very largest markets. (NABOB Comments, pp. 20-21) A number of the markets where the eight-station limit has been exceeded are not among the largest in the nation. (*Id.*) Such

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 111, § 202(b).

[3] *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 47 C.F.R. Section 73.3555*, 11 FCC Rcd 12368, 12370 (1996).

[4] This occurred because the current radio market definition focuses on the predicted coverage areas of stations, which has little relation to the actual economics of the commercial radio industry and its sale of advertising. As a matter of business reality, advertisers primarily look to Arbitron for relative market strength and service when they make their buying decisions. They do not, as a general rule, test radio stations' signals or coverages. Therefore, Arbitron metro market is the logical and rational choice for the Commission to use in defining radio markets because it is exactly the delineation of radio "market" used by radio competitors and their advertising buyers.

repeated violation of statutory intent has been caused by defining radio markets by signal overlaps.

In light of that specific evidence, and the well founded evidence of loss of diversity shown by NABOB throughout its Comments, NABOB states:

> The Commission asks in the Radio Ownership NPRM whether the appropriate geographic area for measuring diversity should be coextensive with the relevant geographic market for competition purposes? Radio Ownership NPRM at para. 33. The answer to the question is yes. The principal barrier to increased diversity of ownership by minority owners is the inability of small minority owned companies to compete with large majority owned companies. Ofori Study at 2. Thus, in this regard, the competitive and diversity objectives call for a similar policy approach.
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> Moreover, the appropriate geographic area that should be used for diversity and competition is the Arbitron market. Arbitron markets should be used to determine whether the acquisition of a radio facility will impede increased diversity and whether it will impede competition. (NABOB Comments, p. 18).

In its Comments, Inner City requested that the Commission amend its radio markets definition by relying on Arbitron metro. By doing so, it would apply a competitively neutral definition to radio markets based upon economically real information readily available to the public as a whole. The public interest would be promoted by supporting the Congressional intent expressed in Section 202 of the Telecommunications Act of 1996, advancing a consistent approach to media ownership and improving the opportunities for diversity from minority owners.[5]

[5] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 796-797, 98 S. Ct. 2096, 2112-2113, 56 L. Ed. 697 (1978), in which the Court held that the Commission rationally could find that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint.

Moreover, this modest adjustment to the Commission's definition of radio market would satisfy the courts in requiring that ownership restrictions be subject to consistent standards.[6] For a considerable period of time, the Commission has relied upon Arbitron metro as the presumptive geographic market when analyzing the local competitive effects of radio station consolidations. For example, in *Whitehall Enterprises* the Commission stated:

> Pursuant to our interim policy, we presume that the relevant geographic market is Arbitron metro.
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> * * * *
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> We believe that, in most cases, the Arbitron metro, or its financial equivalent, is the relevant geographic market for assessing the competitive effects of a proposed transaction. . . . Our presumption regarding Arbitron metro is consistent with the approach taken by the antitrust authorities. The [Department of Justice] has, in reviewing radio mergers, generally relied on the Arbitron metro as the appropriate geographic market.[7]

Thus, the Commission has noted not only its own reliance on Arbitron metro for competition analysis, but also the Justice Department's reliance on Arbitron metro for such analysis. Furthermore, *Whitehall Enterprises* is not an isolated case. The presumption regarding Arbitron metro has been noted in several other Commission decisions.[8] In sum, for several years the Commission has relied on the Arbitron metro routinely in judging the potential competitive effects of radio station consolidations. Clearly, experts within the Commission and the DOJ are

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[6] *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), *rehearing denied* (Aug. 12, 2002) (remanding FCC decision because standards for reviewing effects on local competition of proposed consolidations were inconsistent between the local television ownership and the local radio and television cross-ownership rules).

[7] *Application of Whitehall Enterprises, Inc. and Clear Channel Broadcasting Licenses, Inc.*, 17 FCC Rcd 17509, 17515 (2002).

[8] *See, e.g.*, *Application of Daugherty Broadcasting Co.*, 17 FCC Rcd. 18468, 18474 (2002); *Application of Hilco Communications, Inc.*, 17 FCC Rcd 16985, 16992 (2002); *Application of Pressly Enterprises, LLC*, 17 FCC Rcd 14079, 14085 (2002); *Rules and Policies Concerning*

satisfied that Arbitron metro presumptively is the appropriate geographic market for competitive analysis of local radio ownership issues.

Irrationally, however, the Commission otherwise has relied on a signal-based market definition: "A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned."[9] It is bizarre that in applying for FCC consent to the acquisition of radio stations, the Commission will rely upon overlapping signals as defining the "market," but in subsequent "screening," the Commission's staff will consider station revenues reported by BIA and what competitive effects may take place within the market defined by Arbitron, not by signals. In the event that the same application is subject to scrutiny due to concerns about potential effects on local competition, the Commission then will presumptively rely on Arbitron metro as the definition of the local market.[10]

It is exactly that kind of arbitrary inconsistency in its application of media ownership standards that the courts demand that the Commission reconcile. For example, in *Sinclair Broadcast Group v. FCC*,[11] the court remanded the Commission's decision concerning its television local ownership rule because for purposes of examining effects on competition it excluded all media sources, or "voices," except other broadcast television stations, but in

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Multiple Ownership of Radio Broadcast Stations in Local Markets, 16 FCC Rcd 19861, 19896 (2001).

[9] *Whitehall Enterprises*, 17 FCC Rcd at 17514 (citing 47 C.F.R. § 73.3555(a) and *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 47 C.F.R. Section 73.3555*, 11 FCC Rcd 12368 (1996)).

[10] See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19870 (2001) for discussion of a "red flagged" pubic notice. It is worth noting that the use of Arbitron metro is, and should remain, presumptive. Applicants before the Commission have the opportunity to prove that a different radio market definition would be appropriate under specific circumstances, including mutually overlapping signals.

examining local radio and television cross-ownership issues, the Commission would consider other media outlets as "voices," including the non-broadcast outlets of local newspapers and cable television systems.[12] The court found such unexplained inconsistencies in considering local market consolidations to be unsupportable.

Therefore, based upon the record in this proceeding, the Commission should amend its radio market definition to presume that Arbitron metro is the relevant geographic market for all analytical purposes. That action would make permanent its current interim policy which relies on Arbitron metro, would be the kind of consistent, realistic, economically rational standard courts require, and would harmonize the Commission's review of radio station consolidations with comparable Department of Justice standards, and with economic reality. It also would advance the public interest in promoting diversity in radio broadcasting.

Respectfully submitted,

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[11] 284 F.3d 148 (D.C. Cir. 2002), *rehearing denied* (Aug. 12, 2002).

[12] *Id.* at 161-162.